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E.PIPHANY, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

E.PIPHANY, INC., a California corporation,

Plaintiff,

vs.

ST. PAUL FIRE & MARINE INSURANCE
COMPANY, a Minnesota corporation,

Defendant.

Case No.: CV-08-2621-PVT

Hon. Patricia V. Trumbull

**DECLARATION OF RYAN J. PADDEN IN
SUPPORT OF PLAINTIFF E.PIPHANY,
INC.'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ST. PAUL
FIRE & MARINE INSURANCE
COMPANY'S DUTY TO DEFEND AND
BREACH OF ITS DUTY TO DEFEND**

Date: July 21, 2008

Time: 9:00 a.m.

Ctrm: 5, 4th Floor

1 I, RYAN J. PADDEN, declare:

2 1. I am a counsel with the law firm of O'Melveny & Myers LLP, located at
3 Embarcadero Center West, 275 Battery Street, San Francisco, CA 94111. O'Melveny & Myers was
4 counsel of record for Epiphany, Inc. ("Epiphany") in the cases styled (1) *Sigma Dynamics, Inc. v.*
5 *E.piphany, Inc.*, case no. CV-04-0569-MJJ, U.S. District Court for the Northern District of
6 California and (2) *E.piphany, Inc. v. Sigma Dynamics, Inc.*, et al., case no. CIV-439133, Superior
7 Court of the State of California, County of San Mateo. I know the facts set forth in this declaration
8 to be true and correct based on my personal knowledge thereof and, if called to testify, I could and
9 would testify competently thereto.

10 2. Attached as **Exhibit "1"** is a true and correct copy of the first amended complaint
11 filed on February 10, 2004 by Sigma Dynamics, Inc. ("Sigma") against Epiphany in the case styled
12 as *Sigma Dynamics, Inc. v. E.piphany, Inc.*, Case no. CV-04-0569-MJJ, U.S. District Court for the
13 Northern District of California.

14 3. Attached as **Exhibit "11"** is a true and correct copy of excerpts of the deposition
15 testimony of Michael J. A. Berry given at 101 Jefferson Dr., Menlo Park, CA 94025 on May 13,
16 2005 before and recorded by Jane H. Stuller, a certified shorthand reporter in the case of *E.piphany,*
17 *Inc. v. Sigma Dynamics, Inc.*, et al., case no. CIV-439133.

18 4. Attached as **Exhibit "12"** is a true and correct copy of excerpts of the deposition
19 testimony of Donald Dureau given at the offices of Perkins Coie, LLP, 180 Townsend Street, San
20 Francisco, CA 94107 on February 16, 2005 before and recorded by Joanne Ichiki, a certified
21 shorthand reporter in the case of *E.piphany, Inc. v. Sigma Dynamics, Inc.*, et al., case no. CIV-
22 439133. I appeared at and defended the deposition.

23 I declare under penalty of perjury under the laws of the United States that the foregoing is
24 true and correct.

25
26 Dated: June 11, 2008

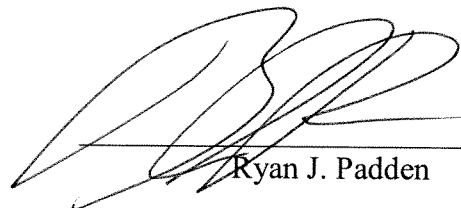

Ryan J. Padden

EXHIBIT 1

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DAVID R. BURTT, State Bar No. 201220
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Attorneys for Plaintiff
SIGMA DYNAMICS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIGMA DYNAMICS, INC., a Delaware
corporation,

Plaintiff,

v.

E.PIPHANY, INC., a Delaware corporation,
Defendant.

Case No: 04-0569 MJJ

FIRST AMENDED COMPLAINT FOR:

- (1) FALSE ADVERTISING & UNFAIR
COMPETITION UNDER 15 U.S.C.
§ 1125(a);
- (2) FALSE ADVERTISING UNDER
BUS. & PROF. CODE § 17500; and
- (3) UNFAIR COMPETITION UNDER
BUS. & PROF. CODE § 17200.

DEMAND FOR JURY TRIAL

Plaintiff Sigma Dynamics, Inc. ("Sigma Dynamics" or "Sigma") hereby alleges for its First Amended Complaint against Defendant E.piphany, Inc. ("E.piphany"), on personal knowledge as to its own acts and on information and belief as to the actions of others, as follows:

PRELIMINARY STATEMENT

1. This is an action for false advertising and unfair competition aimed at redressing E.piphany's misrepresentations about its technology to the public, customers, potential customers, and prominent industry analysts. Sigma Dynamics and E.piphany are direct competitors in the market for software products that enable businesses to more efficiently manage and optimize their customer interactions. One important differentiator between competing products in this market is whether the software is written in Java and is fully compliant with J2EE application server technology, since those features provide businesses with significant and measurable benefits when

FIRST AMENDED COMPLAINT FOR FALSE
ADVERTISING AND UNFAIR COMPETITION
Case No. C-04-0569 MJJ

EXHIBIT 1

1 compared with older proprietary and non-standards based software (e.g., software written in C++).
2 Since at least mid-2002, E.piphany has been falsely advertising its product suite as “all Java” and
3 “fully J2EE.” E.piphany’s products are not “all Java” or “fully J2EE,” and E.piphany’s
4 misrepresentations about the underlying architecture and implementation of its products have
5 given it an unfair and undeserved advantage over competitors, some of which do offer “all Java”
6 and “fully J2EE” software solutions. E.piphany’s misleading statements have caused prominent
7 industry and financial analysts to publish unfair product comparisons and reviews, which have
8 compounded the confusion caused by E.piphany’s direct statements to customers and prospective
9 customers and led to unwise purchasing decisions by IT departments worldwide. Despite recently
10 admitting to Sigma that its directly competitive Interaction Advisor product is written in C++ and
11 is not “all Java” or “fully J2EE,” E.piphany has rebuffed Sigma’s attempts to resolve this dispute
12 informally. Thus, Sigma has been forced to file this litigation to level the playing field in the
13 market for customer relationship management software.

14 THE PARTIES

15 2. Sigma Dynamics is a Delaware corporation with its principal place of business in
16 Foster City, California. Sigma creates “business process intelligence” software that continuously
17 observes and improves core business processes in terms of costs, revenue generation, and other
18 business metrics. Sigma is, and at all relevant time was, qualified to do business in California.

19 3. E.piphany is a Delaware corporation with its principal place of business in San
20 Mateo, California. E.piphany is in the business of providing customer relationship management
21 (“CRM”) software to companies in retail, financial services, communications, technology, travel,
22 and other industries.

23 JURISDICTION AND VENUE ALLEGATIONS

24 4. This Court has jurisdiction over the subject matter of this action pursuant to
25 28 U.S.C. §§ 1331 and 1338, 15 U.S.C. § 1121, and this Court’s supplemental jurisdiction under
26 28 U.S.C. § 1367.
27
28

1 5. The claims stated in this action arise under 15 U.S.C. §§ 1125(a) and California
2 Business & Professions Code §§ 17200 *et seq.* and §§ 17500 *et seq.*

3 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial
4 part of the events giving rise to the claims occurred herein.

5 **INTRA DISTRICT ASSIGNMENT**

6 7. This action is properly filed in the San Francisco Division of the United States
7 District Court for the Northern District of California pursuant to Civil Local Rule 3-2(d) because a
8 substantial part of the events giving rise to the claims set forth in this Complaint occurred in San
9 Mateo County.

10 **STATEMENT OF RELEVANT FACTS**

11 *The Parties*

12 8. Founded in August 2002, Sigma Dynamics provides enterprise software products
13 that allow businesses to make better decisions in real-time at specific points in enterprise business
14 processes. Businesses can use these products to solve a wide range of CRM and non-CRM
15 business problems; for example, in providing cross-selling offers or content recommendations to
16 customers through various customer contact channels.

17 9. Founded in 1996, E.piphany develops, markets, and sells a series of CRM software
18 products. E.piphany claims that “[m]ore than 460 companies, including nearly 40 of the Fortune
19 100, use E.piphany software products to enhance their customers’ experiences while, at the same
20 time, realizing the companies’ business objectives.”

21 10. E.piphany and Sigma Dynamics are direct competitors for specific products within
22 their respective product lines.

23 11. In the CRM marketplace, E.piphany has struggled to compete against much larger
24 CRM providers such as Siebel Systems, Oracle, PeopleSoft, and SAP, and has seen industry
25 recognition shift to newer CRM providers such as Salesforce.com. In recent years, E.piphany has
26 sustained hundreds of millions of dollars in operating losses, significantly downsized its
27 workforce, and closed or downsized the bulk of its international operations. It is within this
28

1 business context that E.piphany has deliberately engaged in the pattern of anti-competitive actions
2 further detailed in this complaint.

3 *The Technology*

4 12. Developed by Sun Microsystems, J2EE (which stands for Java 2 Platform,
5 Enterprise Edition) is a Java-based set of coordinated specifications and practices that together
6 enable solutions for developing, deploying, and managing multi-tier, server-centric applications.
7 J2EE is widely accepted to be a modern and standards-based platform that provides specific and
8 tangible benefits to companies, including a common programming language environment (Java),
9 standard system management capabilities, reuse of standards-based connectors, and a standard
10 approach to clustering and failover. Many large enterprises have corporate information technology
11 ("IT") purchasing criteria that specify or favor applications that are fully compliant with J2EE and
12 that run on standard J2EE application server environments. For this reason, many enterprise
13 software companies have based their newer products on J2EE and have rewritten older software
14 products to run as Java applications on standard J2EE application servers.

15 13. While software products written in the C++ programming language may
16 communicate or coexist with J2EE applications, those products are not themselves considered to
17 be J2EE applications since they are not written in Java, do not leverage common underlying J2EE
18 services, and would not pass J2EE application certification criteria. E.piphany recognizes this
19 distinction; indeed, Phil Fernandez, E.piphany's President and Chief Operating Officer, has
20 publicly stated the following:

21 "I have seen vendors quoted as saying they offer J2EE products, but in reality their
22 software is written in C++. Obviously, a product that is not even written in Java cannot be
23 J2EE. But we find ourselves fighting a losing battle, because claims like this are given
24 legitimacy in press and analyst reports."

24 *E.piphany's Unlawful Conduct*

25 14. E.piphany advertises and promotes its products and services in interstate commerce
26 through, among other media, industry-sponsored conferences, press releases, Internet advertising,
27 and sales and customer presentations.
28

1 15. Like every major player in the industry, E.piphany understands the importance that
2 the opinions of industry analysts and financial analysts have in the buying process for enterprise
3 software. A recent survey of IT departments conducted by a leading market research firm
4 confirms that industry and financial analyst reports are the two main sources of information that
5 influence customers' perceptions about technology companies and their products. E.piphany
6 therefore advertises and promotes its product through the statements it makes to industry and
7 financial analysts about its software, and often republishes their reports to further mislead potential
8 customers' purchasing decisions.

9 16. Using every channel at its disposal, E.piphany has made, and continues to make,
10 false and misleading statements about its products and their performance. For example, at some
11 point in 2002, E.piphany began advertising that its product suite is "all Java" and "fully J2EE."

12 17. E.piphany has made its claim to be "all Java" and "fully J2EE" a core part of its
13 positioning in the market, and claims a competitive advantage over other software vendors based
14 on that alleged differentiator.

15 18. Despite making public claims, since at least August 2002, that it "is the first full-
16 suite CRM vendor to market a complete product suite built on J2EE" and that it has released "the
17 only component-based, fully-J2EE complete CRM suite available," E.piphany's product suite has
18 never been "all Java" nor "fully J2EE." Since mid-2002, key products in E.piphany's "product
19 suite," including without limitation Interaction Advisor, have not been "all Java" or "fully J2EE."

20 19. Interaction Advisor is E.piphany's real-time analytics product line, and is a
21 significant driver of the company's revenues as well as its industry recognition and differentiation.
22 E.piphany's Chief Executive Officer, Karen Richardson, has called Interaction Advisor the
23 company's "Trojan horse" into large customer accounts, and claimed the product line is "truly
24 differentiated" with "no competitors." During Q403 and into Q104, E.piphany was actively
25 recruiting software development engineers to work on "major features" of "new releases" for its
26 Interaction Advisor product. According to a job posting carried on E.piphany's Website, the only
27 programming skill required for these Interaction Advisor positions was "fluency in C++."

1 20. Indeed, in recent correspondence to Sigma Dynamics, E.piphany's Chief Executive
2 Officer confirmed that E.piphany's CRM product suite is not written in "all Java," and further
3 acknowledged that parts of at least one of the components of its product suite are still written in
4 C++ "for important performance reasons."

5 E.piphany's False and Misleading Statement: Earnings Calls and Earnings Releases

6 21. E.piphany conducts quarterly earnings conference calls where any member of the
7 public, including customers and potential customers, can attend by simply listening in on the call.
8 E.piphany regularly announces these conference calls in press releases, promotes them on the
9 company Website, and makes them available to listeners via both audio conferences and Webcasts.
10 Many customers and prospective customers for E.piphany's (and Sigma's) software listen in on
11 these calls, during which E.piphany's senior management team discusses E.piphany's development
12 efforts, market differentiators, and business results. E.piphany knows that statements made about
13 its products on these calls directly or indirectly influence the software purchasing decisions of
14 large IT departments.

15 22. E.piphany also knows that financial analysts listen to these calls and closely follow
16 E.piphany's earnings press releases, and then publish reports assessing E.piphany's financial well-
17 being and the viability of E.piphany's technology, often comparing it with technology available
18 from competitors. As a second-tier CRM vendor that has struggled to gain traction against larger
19 competitors like Siebel and SAP, E.piphany knows that prospective customers routinely rely on
20 financial analyst opinions and reports as one source to better understand E.piphany's financial
21 viability as a company and their strategic viability as an enterprise software provider. E.piphany
22 uses these occasions as events to promote and advertise its products.

23 23. On October 17, 2002, E.piphany issued its Q302 earnings press release, in which
24 then-Chief Executive Officer Roger Siboni was quoted as stating, "The launch of E.6 Service in
25 August completed the E.6 Platform, the only component-based, fully-J2EE complete CRM suite
26 available." During E.piphany's Q302 earnings conference call, held the same day, Mr. Siboni
27 amplified this false and misleading claim by stating that E.piphany was "the J2EE player in the
28

1 marketplace.” Mr. Siboni made these statements, at least in part, for the purpose of promoting and
2 advertising E.piphany’s software. Sigma is informed and believes that E.piphany made the same
3 or similar statements directly to prospective customers in an effort to market and sell Epiphany’s
4 product suite.

5 24. On January 23, 2003, during E.piphany’s Q402 earnings conference call, Mr.
6 Siboni claimed that E.piphany had delivered “one of the first end to end J2EE products and
7 product platforms.” Mr. Siboni made this statement, at least in part, for the purpose of promoting
8 and advertising E.piphany’s software. Sigma is informed and believes that E.piphany made the
9 same or similar statements directly to prospective customers in an effort to market and sell
10 Epiphany’s product suite.

11 25. In March 2003, E.piphany released its 2002 Annual Report (Form 10-K), which
12 stated the following:

13 “J2EE compliance. The E.6 Suite is developed on the Java Two, Enterprise Edition, or
14 J2EE, development platform. This industry standard set of development specifications
15 leverages the strengths of the Java programming language to enable software applications
that are easier to develop, configure and integrate with our customers’ existing systems.”

16 E.piphany made this statement, at least in part, for the purpose of promoting and advertising
17 E.piphany’s software. Sigma is informed and believes that E.piphany made the same or similar
18 statements directly to prospective customers in an effort to market and sell Epiphany’s product
19 suite.

20 26. On October 20, 2003, during E.piphany’s Q303 earnings conference call, Chief
21 Executive Officer Karen Richardson recapped E.piphany’s public positioning around Java and
22 J2EE, and its importance to the marketplace, by claiming that E.piphany is “the only full-footprint
23 vendor who actually has a full J2EE architecture, and that doesn’t mean that you just, you know,
24 cooperate with, I mean fully embedded from the ground up, all Java, we’re the only vendor that
25 has that, and I think we have a couple year lead.” Ms. Richardson’s comments were in response to
26 a question from Gary Abbott at Merriman Curhan Ford, who later published an investor research
27 report on E.piphany (dated January 30, 2004) that stated “[E.piphany’s] technical architecture is
28 fully J2EE-compliant and runs on standard commercial application server products. This helps

1 differentiate Epiphany and satisfies an increasingly common customer requirement that many of its
2 competitors do not.” Ms. Richardson made this statement, comparing E.piphany’s software to that
3 of the competition, at least in part for the purpose of promoting and advertising E.piphany’s
4 software. Sigma is informed and believes that E.piphany made the same or similar statements
5 directly to prospective customers in an effort to market and sell Epiphany’s product suite.

6 27. On January 9, 2004, at the Sixth Annual Needham Growth Conference, Ms.
7 Richardson stated the following:

8 “[E.piphany] spent about \$100 million dollars rewriting the entire E.piphany platform
9 around a J2EE architecture and the last year has all been about shipping that and selling the
10 first, you know, couple dozen customers and talking about those references to people like
yourselves . . . [We] built all of our applications as component Lego building blocks on top
of J2EE, and they can be assembled in blended ways . . .”

11 Ms. Richardson made this statement, at least in part, for the purpose of promoting and advertising
12 E.piphany’s software. Sigma is informed and believes that E.piphany made the same or similar
13 statements directly to prospective customers in an effort to market and sell Epiphany’s product
14 suite.

15 E.piphany’s False and Misleading Statements: Press Releases

16 28. On January 14, 2003, E.piphany published a press release entitled *E.piphany*
17 *Advances Relationship with IBM by Delivering Open-Standards CRM*, which claimed that the
18 E.piphany E.6 CRM suite provides “a fully integrated and certified one-vendor solution that
19 delivers a true J2EE, standards-based architecture.” Sigma is informed and believes that
20 E.piphany made the same or similar statements directly to prospective customers in an effort to
21 market and sell Epiphany’s product suite.

22 29. On August 4, 2003, E.piphany published a press release entitled *E.piphany*
23 *Announces Support of BEA Weblogic Platform 8.1*, which claimed that “E.piphany offers the only
24 full-footprint CRM suite natively built on a service-oriented J2EE architecture.” Sigma is
25 informed and believes that E.piphany made the same or similar statements directly to prospective
26 customers in an effort to market and sell Epiphany’s product suite.

30. In October 2003, E.piphany published a press release entitled *KLM Selects E.piphany Customer Relationship Management Software Solution*, which claimed that E.piphany's "real-time Interaction Advisor technology and strong analytics, and our J2EE architecture were the key drivers for KLM to choose us as a partner." Sigma is informed and believes that E.piphany made the same or similar statements directly to prospective customers in an effort to market and sell Epiphany's product suite.

E.piphany's False and Misleading Statements: E.piphany's Website

31. At least as late as June 16, 2004, E.piphany's Website included the following text:

"All E.piphany E.6 solutions are built on the industry's most modern and innovative customer relationship management (CRM) architecture. Based on the Java 2 platform, Enterprise Edition (J2EE), and using a service-oriented architecture, E.6 provides maximum flexibility for faster implementation and integration, and allows IT organizations to reuse skills for increased productivity and lower overall costs. The E.6 architecture lets organizations take full advantage of the scalability, reliability, and integration features built into industry-standard J2EE application servers."

Sigma is informed and believes that E.piphany made the same or similar statements directly to prospective customers in an effort to market and sell Epiphany's product suite.

32. At least as late as February 10, 2004, E.piphany's Website also included the following text:

"The same technology that delivers E.piphany's superior scalability – namely full support for standard J2EE application servers and the ability to be deployed in a stateless environment – also ensures that E.piphany applications are consistently available to users in your enterprise, even in the event of server failure."

Sigma is informed and believes that E.piphany made the same or similar statements directly to prospective customers in an effort to market and sell Epiphany's product suite.

E.piphany's False and Misleading Statements: Industry Analysts and Research Firms

33. E.piphany has also made false statements about its products to industry analysts for the purpose of influencing customers' and prospective customers' purchasing decisions. E.piphany's deceptive statements about its products have mislead prominent industry research firms, including Gartner Group and Patricia Seybold Group, to publish research reports which replicate E.piphany's false statements.

1 34. To further market and promote its products, E.piphany republishes many of the
2 industry analysts' misleading reports, further misleading customers and prospective customers
3 who rely on these reports and on E.piphany's own statements when making purchasing decisions.

4 35. In August 2002, industry analyst Patricia Seybold Group made the following
5 statement in its publication entitled *Comparing CRM Architectures*:

6 "E.6 is the top ranked infrastructure. E.piphany made a major R&D investment in
7 architecture for E.6, integrating a diverse set of in-house-developed and acquired
8 applications, implementing them consistently in Java, and deploying them on a J2EE
9 infrastructure. This infrastructure has no proprietary elements and no legacy technology to
accommodate. E.6 has the cleanest infrastructure of the five architectures that we
evaluated. The firm has done a very nice job."

10 Patricia Seybold Group based the above statement on information that E.piphany provided to it for
11 the purpose of advertising and promoting its software. Rather than correct these false and
12 misleading claims, E.piphany issued a worldwide press release touting the report on August 20,
13 2002, entitled *Patricia Seybold Group Designates E.piphany E.6 as the Best CRM Architecture*.
14 In the press release, E.piphany also stated that "E.piphany E.6 is the first end-to-end CRM suite
15 designed and built on a unified J2EE-based platform." E.piphany republished and touted Patricia
16 Seybold's misleading product review (which was based on E.piphany's misleading statements) for
17 the purpose of advertising and promoting E.piphany's software. E.piphany has made this press
18 release publicly available since its origination and it remains on E.piphany's Website today.
19 Sigma is informed and believes that E.piphany made the same or similar statements directly to
20 prospective customers in an effort to market and sell E.piphany's product suite.

21 36. In March 2003, in a publication entitled *E.piphany E.6: How E.piphany's CRM*
22 *Suite Stacks Up against Our Framework for Evaluating Multi-Channel CRM Solutions*, Patricia
23 Seybold Group stated that E.piphany's product suite is "[b]uilt of collections of EJBs and BIOs
24 components that are specified in Java." Patricia Seybold Group based the above statement on
25 information that E.piphany provided to it for the purpose of advertising and promoting its
26 software. Sigma is informed and believes that E.piphany provided the same or similar information
27 directly to prospective customers in an effort to market and sell E.piphany's product suite.
28

1 E.piphany makes this publication freely available for download on its Website for the purpose of
2 advertising and promoting E.piphany's software.

3 37. In July 2003, Gartner Group made the following statement in its publication
4 entitled *The Gartner CRM Software Vendor Guide: 2003*:

5 "E.piphany: This vendor continues to experience strong differentiation through its
6 real-time recommendation engine. The E6 rewrite of the application code base into
J2EE appeals to the many enterprises pursuing a Web services architecture."

7 Gartner Group based the above statement on information that E.piphany provided to it for the
8 purpose of advertising and promoting its software. Sigma is informed and believes that E.piphany
9 provided the same or similar information directly to prospective customers in an effort to market
10 and sell Epiphany's product suite.

11 38. In September 2003, Gartner Group published a report entitled *CRM Applications –*
12 *An Architectural Review of Key Vendors* which included a diagram that shows E.piphany's
13 architecture as being all Java and J2EE. The report further states that "E.piphany's current release
14 establishes a full suite under common tools and compatibility with several J2EE-compliant
15 commercial application servers." Gartner Group based the above diagram and statement on
16 information that E.piphany provided to it for the purpose of advertising and promoting its
17 software. Sigma is informed and believes that E.piphany provided the same or similar information
18 directly to prospective customers in an effort to market and sell Epiphany's product suite.

19 39. Customers and potential customers for E.piphany's and Sigma's software products
20 rely on the publications of industry research firms Gartner Group, Patricia Seybold Group, and
21 others in formulating opinions as to which software products to purchase. In fact, in addition to
22 financial analyst reports, industry analyst reports are one of the most influential factors on IT
23 purchasing decisions.

24 40. As shown above, rather than correct industry research reports that republish
25 E.piphany's false statements regarding its technology, E.piphany cites these misleading reports in
26 press releases, on its Website, and in other public statements, further compounding the damage.
27 By providing deliberately false and misleading statements about its software to industry analysts,
28

1 then bolstering its direct marketing efforts by republishing their inaccurate reports, E.piphany's
2 conduct further perpetuates the "all Java" and "fully J2EE" myths about its software and damages
3 fair competition in the marketplace.

4 41. E.piphany has made, and continues to make, literally false, misleading, and
5 deceptive representations, both oral and written, regarding its products to industry analysts,
6 financial analysts, and customers and potential customers, including potential Sigma customers.

7 42. E.piphany's false, deceptive, and misleading representations are material in that
8 they have a natural tendency to influence, or are capable of influencing, purchasing decisions, and
9 they relate to the essential characteristics, quality, and/or nature of competing products and
10 commercial activities, including value, compatibility, interoperability, and quality.

11 43. The foregoing literally false, deceptive, and misleading representations by
12 E.piphany about its technology have damaged, and continue to present the likelihood of damage,
13 to Sigma Dynamics. E.piphany's literally false, deceptive, and misleading representations have
14 damaged Sigma's market share, sales, profits, business relationships, reputation, and goodwill, and
15 have caused potential purchasers of Sigma's products and services to choose E.piphany's products
16 and services instead of Sigma's. Such representations have caused E.piphany to gain, and Sigma
17 to lose, profits, market share, reputation, and goodwill.

18 **FIRST CAUSE OF ACTION**

19 **(False Advertising & Unfair Competition, 15 U.S.C. § 1125(a))**

20 44. Sigma Dynamics realleges and incorporates by reference the allegations of
21 paragraphs 1 through 43 of the Complaint as if fully set forth herein.

22 45. Through its actions as described above, E.piphany has violated the Lanham Act, 15
23 U.S.C. § 1125(a), by using false and misleading descriptions and representations of fact in
24 commercial advertising or promotion in connection with products and services in interstate
25 commerce, which descriptions and representations misrepresent the nature and qualities of
26 E.piphany's goods, services, or commercial activities, all to the damage of Sigma Dynamics.
27
28

1 46. At all relevant times, E.piphany knew that its advertising and promotional
2 activities, as described above, were literally false, misleading, and deceptive. E.piphany has acted
3 willfully, deliberately, and in bad faith.

4 47. E.piphany's acts described above, including E.piphany's literally false, misleading,
5 and deceptive advertising and promotional activities, are likely to cause, and have caused,
6 confusion, mistake, or deception among the public.

7 48. By reason of E.piphany's acts, Sigma Dynamics has suffered and will continue to
8 suffer damage to its business and goodwill, and the loss of sales and profits it would have made
9 but for E.piphany's acts, in an amount to be proven at trial.

10 49. E.piphany's acts described above, including E.piphany's literally false, misleading,
11 and deceptive advertising and promotional activities, have caused injury to Sigma Dynamics and
12 the general public and, unless enjoined, will continue to cause injury to Sigma and the general
13 public. Accordingly, Sigma is entitled to temporary, preliminary, and/or permanent injunctive
14 relief as set forth below.

15 50. Moreover, because this is an exceptional case, involving calculated and willful
16 misconduct by E.piphany, Sigma Dynamics is entitled to recover attorneys' fees against E.piphany.

17 **SECOND CAUSE OF ACTION**

18 **(False Advertising, Cal. Bus. & Prof. Code § 17500)**

19 51. Sigma Dynamics realleges and incorporates by reference the allegations of
20 paragraphs 1 through 50 of the Complaint as if fully set forth herein.

21 52. By the acts described above, E.piphany has made, and continues to make, false and
22 misleading statements in connection with the sale of competing products and service in violation
23 of California Business and Professions Code Sections 17500 *et seq.*, causing injury to Sigma
24 Dynamics and its business and property.

25 53. At all relevant times, E.piphany knew that its advertising and promotional
26 activities, as described above, were literally false, misleading, and deceptive. E.piphany has acted
27 willfully, deliberately, and in bad faith.

54. E.piphany's acts described above, including E.piphany's literally false, misleading, and deceptive advertising and promotional activities, have caused injury to Sigma Dynamics and the general public and, unless enjoined, will continue to cause injury to Sigma and the general public. Accordingly, Sigma is entitled to temporary, preliminary, and/or permanent injunctive relief as set forth below.

THIRD CAUSE OF ACTION

(Unfair Competition, Cal. Bus. & Prof. Code § 17200 *et seq.*)

55. Sigma Dynamics realleges and incorporates by reference the allegations of paragraphs 1 through 54 of the Complaint as if fully set forth herein.

56. By the acts described above, E.piphany has engaged in unlawful and unfair business practices and has performed unfair, deceptive, and misleading acts in violation of California Business and Professions Code Sections 17200 *et seq.*, causing injury to Sigma Dynamics and its business and property.

57. At all relevant times, E.piphany knew that its advertising and promotional activities, as described above, were literally false, misleading, and deceptive.

58. E.piphany's acts described above, including E.piphany's literally false, misleading, and deceptive advertising and promotional activities, have caused injury to Sigma Dynamics and unless enjoined, will continue to cause injury to Sigma. Accordingly, Sigma is entitled to temporary, preliminary, and/or permanent injunctive relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Sigma Dynamics requests that the Court enter judgment in its favor and against E.piphany on its Complaint as follows:

A. That E.piphany, its officers, agents, servants, employees, affiliates, parent or subsidiary corporations, attorneys, and all those in privity or acting in concert with E.piphany, be enjoined temporarily, preliminarily, and/or permanently from making literally false, deceptive, and misleading representations about E.piphany's products and services and from otherwise unfairly competing against Sigma Dynamics;

1 B. That an accounting be entered and judgment rendered against E.piphany for
2 disgorgement of all profits received from the sale of E.piphany's products and services sold during
3 the period that the subject literally false, deceptive, and misleading representations have been
4 made and that Sigma Dynamics be awarded such profits;

5 C. That E.piphany pay compensatory damages to Sigma Dynamics in an amount to be
6 determined at trial, including Sigma's damage control costs, which are attributable to the subject
7 literally false, deceptive, and misleading advertising and related actions that caused confusion, a
8 likelihood of confusion, and damages to Sigma and its sales, profits, reputation, and goodwill;

9 D. That E.piphany pay enhanced damages to Sigma Dynamics of at least treble the
10 amount of compensatory damages, due to E.piphany's intentional, willful, deliberate, malicious,
11 egregious, and bad faith actions, and to deter such actions in the future;

12 E. That E.piphany pay punitive damages to Sigma Dynamics in an amount to be
13 determined at trial, due to E.piphany's intentional, willful, malicious, egregious, and bad faith
14 actions, and to deter such actions in the future;

15 F. That E.piphany be ordered to correct its advertising and publish appropriate
16 corrective advertisements and press releases, calling the public's attention thereto;

17 G. That E.piphany pay Sigma Dynamics its costs in bringing this action, including
18 reasonable attorneys' fees and expenses associated with bringing and prosecuting this action; and

19 H. Such other relief as the Court deems just and reasonable.

20 **DEMAND FOR JURY TRIAL**

21 Sigma Dynamics demands trial by jury of all issues triable by a jury pursuant to Federal
22 Rule of Civil Procedure 38 and Civil L.R. 3-6(a).

23
24 DATED: July 15, 2004

PERKINS COIE LLP

25 By: 
26 David R. Burt

27 Attorneys for Plaintiff
28 SIGMA DYNAMICS, INC.

CERTIFICATION OF INTERESTED ENTITIES OR PARTIES

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

DATED: July 15, 2004

PERKINS COIE LLP

By: 
David R. Burt

Attorneys for Plaintiff
SIGMA DYNAMICS, INC.

EXHIBIT 11

1 SUPERIOR COURT IN THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN MATEO

3

4 EPIPHANY, INC., a Delaware
Corporation,

5 Plaintiff,

6 vs.

) No. CIV-439133

7 SIGMA DYNAMICS, INC., a
8 Delaware Corporation; DAVID

PANEK, an individual;

9 CORTNY MEZZETTA CHRISTENSEN,
an individual; DOES 1-100,

10 inclusive,

11 Defendants,

12

13

14

15 HIGHLY CONFIDENTIAL

16 ATTORNEYS' EYES ONLY

17 DEPOSITION OF

18 MICHAEL J.A. BERRY

19 MENLO PARK, CALIFORNIA

20 MAY 13, 2005

21

22

23

24 REPORTED BY: JANE H. STULLER, CSR NO. 7223, RPR

25 3-199781

1

EXHIBIT 11

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN MATEO

3

4 EPIPHANY, INC., a Delaware
Corporation,

5

Plaintiff,

6

vs.

7

SIGMA DYNAMICS, INC., a
Delaware Corporation; DAVID

8

PANEK, an individual;

9

CORTNY MEZZETTA CHRISTENSEN,

10

an individual; DOES 1-100,

11

inclusive,

12

Defendants,

13

14

15

16 Deposition of MICHAEL J.A. BERRY, taken on

17 behalf of the Defendants, at 101 Jefferson Drive, Menlo

18 Park, California, commencing at 2:10 p.m., Friday, May

19 13, 2005, before Jane H. Stuller, CSR. No. 7223, RPR.

20

21

22

23

24

25

1 APPEARANCES

2

3 FOR THE PLAINTIFF

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1 INDEX

2

3 WITNESS: MICHAEL J.A. BERRY

4

5 EXAMINATION PAGE

6 BY MR. ANDRE 5

7

8

9 EXHIBITS

10

11 DEFENDANTS'

12 NUMBER DESCRIPTION PAGE

13

14 288 Epiphany, Inc.'s Supplemental 5

15 Objections and Responses to

16 Defendant Sigma Dynamics, Inc.'s

17 Interrogatory No. 1

18

19

20

21

22

23

24

25

1 MICHAEL J.A. BERRY,
2 having been first duly sworn, was
3 examined and testified as follows:

4 EXAMINATION

5 BY MR. ANDRE:

6 Q. Good morning. Would you please state and spell
7 your name for the record.

8 A. My name is Michael Berry. Berry is spelled
9 B-E-R-R-Y -- like the fruit.

10 Q. Mr. Berry, are you here today as an expert for
11 Epiphany, the plaintiff in this case?

12 A. Yes, I am.

13 Q. And what have you been retained by Epiphany to
14 testify to?

15 A. I have been retained to form opinions and
16 testify on the trade secrets of Epiphany and the extent
17 to which they seem to appear in the Sigma Dynamics
18 products.

19 MR. ANDRE: I'll have the court reporter mark
20 as Exhibit 288 a document entitled "Epiphany, Inc.
21 Supplemental Objections and Responses to Defendant Sigma
22 Dynamics Inc.'s Interrogatory No. 1," that is dated May
23 5, 2005 2005.

24 (Whereupon Defendants' Exhibit No 288
25 was marked for identification.)

1 recommendation system, inappropriate and even
2 embarrassing recommendations, that led to the
3 development of the surprise factor which would allow a
4 customer to -- to adjust the level of surprise they were
5 willing to tolerate, basically by suppressing
6 recommendations for rarely purchased products.

7 I think that that's one example of the process.
8 You start with something elegant and compact looking on
9 a whiteboard, you implement it. You run into situations
10 where it doesn't look so good in real life, so you
11 fiddle with it. That's the process I was referring to.

12 Q. Are you aware of other companies that have
13 developed similar formulas to obtain similar rebuttal?

14 A. To my knowledge, before Sigma Dynamics came on
15 the scene, Epiphany really had no competitors in the
16 realtime self-learning marketing model business.

17 Q. And how about today, are there any competitors
18 in the realtime marketing model systems?

19 A. I'm not sure.

20 Q. If you go to page 10, paragraph 9.

21 A. Uh-huh.

22 Q. The sentence there reads: "Epiphany
23 methods and information relating to
24 implementation of dynamic binning and
25 dynamic bucketing."

1 And I have no further questions.

2 MR. ENZMINGER: All right.

3 MR. ANDRE: Excuse me for interrupting about
4 the tutorial.

5 Q. But do you have any opinions with respect to
6 whether Epiphany's product was the worlds only software
7 learning closed loop real-time analytic system before
8 Sigma Dynamics came into the market?

9 A. Yes. I developed an opinion about that.

10 Q. And is Sigma Dynamics the second such product?

11 A. Yes.

12 Q. Are there any other --

13 A. My understanding --

14 Q. I didn't mean to speak over you. Are there any
15 others, to your knowledge?

16 A. Not that I know of.

17 MR. ANDRE: That's all.

18 MR. ENZMINGER: Just one question: What did he
19 mean when he said -- what would you call it? What were
20 you talking about? What does that mean?

21 THE WITNESS: I took that to be a description
22 of the Epiphany real-time analytic.

23 MR. ENZMINGER: What does that mean to you?

24 THE WITNESS: The closed loop I understand to
25 be marketing jargon for meaning, does all the parts.

1 REPORTER'S CERTIFICATION

2

3 I, the undersigned, a Certified Shorthand Reporter

4 of the State of California, do hereby certify:

5 That the foregoing proceedings were taken before me at

6 the time and place herein set forth; that any witnesses

7 in the foregoing proceedings, prior to testifying, were

8 placed under oath; that a verbatim record of the

9 proceedings was made by me using machine shorthand which

10 was thereafter transcribed under my direction; further,

11 that the foregoing is an accurate transcription

12 thereof.

13 I further certify that I am neither financially

14 interested in the action nor a relative or employee of

15 any attorney of any of the parties.

16 IN WITNESS WHEREOF, I have this date subscribed my name.

17

18 DATED: _____

19

20

21 _____

JANE STULLER

22 CSR No. 7223, RPR

23

24

25

EXHIBIT 12

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

E.PIPHANY, INC., a Delaware
corporation,

Plaintiff,

vs.

CASE NO: CV-439133

SIGMA DYNAMICS, INC., a Delaware
corporation; DAVID PANEK, an
individual; CORTNY MESSETTA
CHRISTENSEN, an individual, and
DOES 1-100, inclusive,

Defendants.

/

DEPOSITION OF DONALD DUREAU

Wednesday, February 16, 2005

Pages 1 - 140

ATTORNEYS' EYES ONLY

REPORTED BY JOANNE ICHIKI, CSR #11660

□

2

DONALD DUREAU
ATTORNEYS' EYES ONLY

EXHIBIT 12

1 A P P E A R A N C E S

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13 BY: DAVID R. BURTT, ESQ.

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DONALD DUREAU

ATTORNEYS' EYES ONLY

1 I N D E X

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|---|-----------------|------|
| 2 | EXAMINATION BY: | PAGE |
| 3 | Mr. Burt | 4 |

4

5 E X H I B I T S

| | | | |
|----|-------------|----------------------------------|------|
| 6 | EXHIBIT NO. | DESCRIPTION | PAGE |
| 7 | 49 | Copy, log of instant messaging | 102 |
| 8 | | between D. Dureau and D. Perona, | |
| 9 | | 12/10/03 to 4/5/04, Bates Nos. | |
| 10 | | SIG-TS 031356 to SIG-TS 031363, | |
| 11 | | 8 pages | |
| 12 | | | |
| 13 | 50 | Copy, e-mail from D. Dureau to | 121 |
| 14 | | S. Iverson, 10/1/03, Bates Nos. | |
| 15 | | EP122173 to EP122174, 2 pages | |
| 16 | | | |
| 17 | 51 | Copy, postings on Stand Up - | 137 |
| 18 | | Speak Out by Don Dureau, Sr., | |
| 19 | | various dates, 5 pages | |

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 meanings to different people, let's try to make sure
2 we're on the same page.

3 What is your definition of a non-compete
4 agreement?

5 A. That I was not to go to work for any of the
6 customers I worked for directly while I was working for
7 Card Systems on one of their projects.

8 Q. And Berger was not a Card Systems customer?

9 A. Correct.

10 Q. Do you recall whether that Card Systems
11 agreement also required that you not work for a
12 competitor of Card Systems, as opposed to a customer?

13 A. I do not recall.

14 Q. Using that definition of non-compete, did you
15 have to sign a non-compete agreement with Modis?

16 A. I do not remember specifically.

17 Q. What was your next job after Modis?

18 A. E.Piphany.

19 Q. You would not consider E.Piphany and Modis to
20 be competitors, would you?

21 A. No, I would not.

22 Q. What year did you start at E.Piphany?

23 A. 1999.

24 Q. And you've worked for E.Piphany ever since?

25 A. I have.

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 Sigma ever had communication with you about you coming
2 to work for Sigma Dynamics?

3 A. No.

4 Q. How about any head hunters?

5 A. No.

6 Q. What was your next role after regional
7 director?

8 A. I was Vice President of the Central Region and
9 I -- that was the title.

10 Q. Do you have a new business card every time your
11 title changes?

12 A. I don't.

13 Q. Did you have any jobs between regional director
14 of the central region and your current title?

15 A. Regional director of the central region?

16 MR. PADDEN: You've gotten -- are you asking
17 about --

18 MR. BURTT: What was his answer to my last
19 question?

20 THE WITNESS: Vice President of Central Region.

21 BY MR. BURTT:

22 Q. Today you're Vice President of Worldwide
23 Services?

24 A. I am.

25 Q. What was your job immediately preceding that?

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 A. Vice President of Central Region.

2 Q. Did you have any other titles at E.Piphany
3 other than what we've discussed already?

4 A. Not that I recall.

5 Q. Did your duties for E.Piphany ever extend
6 beyond implementing or working with customers, working
7 in relation to the marketing component?

8 A. My current job duties are running the overall
9 services organization, which has consultants which
10 employ all of our platforms.

11 Q. Today how many individuals are employed in the
12 services organization?

13 A. 65.

14 Q. Do you have direct customer contact in your job
15 today?

16 A. I do.

17 MR. PADDEN: If we're going to get into
18 customers, we'd like to mark this transcript as
19 Attorneys' Eyes Only under the protective order.

20 MR. BURTT: Good idea.

21 BY MR. BURTT:

22 Q. Do you have more or less customer contact today
23 than you did in your first few years at E.Piphany?

24 A. I have contact with more customers for shorter
25 durations.

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 Q. There are competitors to Interaction Advisor;
2 right?

3 A. Are we -- I guess if we consider Sigma one,
4 then the answer is yes. Otherwise, I'm not sure we
5 consider many people competitors for that product. It's
6 fairly unique.

7 Q. Do you personally consider Sigma to be a
8 competitor to Interaction Advisor?

9 A. I believe that they probably are, but I do not
10 know for sure. It's just a hunch.

11 Q. Do you know how many customers Sigma has today?

12 A. You've already asked me that.

13 MR. PADDEN: Objection. Asked and answered.

14 THE WITNESS: Okay.

15 BY MR. BURTT:

16 Q. The answer was no?

17 A. Correct.

18 Q. Do you consider Chordiant to be a competitor of
19 Interaction Advisor?

20 A. No.

21 Q. Sitting here today, other than Sigma Dynamics,
22 you can't think of any other companies you would
23 personally consider to be a competitor of Interaction
24 Advisor?

25 A. I can think of companies that offer part of

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 that solution but not all of them. And my definition of
2 a direct competitor would be something that could offer
3 all those aspects.

4 Q. So Siebel doesn't offer all the aspects of
5 Interaction Advisor?

6 A. Not to my knowledge.

7 Q. Who were some companies that offered parts of
8 that solution?

9 A. SAS is a data mining company. I'm sure there's
10 -- I don't know the names of any other specific once.

11 Q. How about Oracle?

12 A. I've never seen a product that I consider to be
13 a competitor of part.

14 Q. PeopleSoft?

15 A. Same.

16 Q. The last sentence of this, next to the last
17 paragraph you say, "they are itching to expand on that
18 competency."

19 A. Um-hum.

20 Q. What competency are you referring to there?

21 A. Again, to the previous sentence in that
22 paragraph. In general, that if all of the things that
23 people are saying are true and they need to hire, right,
24 then this is a unique competency that takes a long time
25 to grow, that it would stand to reason that they would

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□

DONALD DUREAU
ATTORNEYS' EYES ONLY

1 I, JoAnne Ichiki, duly authorized to administer
2 oaths pursuant to Section 2093(b) of the California Code
3 of Civil Procedure, do hereby certify: That the witness
4 in the foregoing deposition was administered an oath to
5 testify to the whole truth in the within-entitled cause;
6 that said deposition was taken at the time and place
7 therein cited; that testimony of said witness was
8 reported by me and thereafter transcribed under my
9 direction into typewriting; that the foregoing is a
10 complete and accurate record of said testimony; and that
11 the witness was given an opportunity to read and correct
12 said deposition and to subscribe the same.

13 Should the signature of the witness not be
14 affixed to the deposition, the witness shall not have
15 availed himself/herself of the opportunity to sign or
16 the signature has been waived.

17 I further certify that I am not of counsel nor
18 attorney for any of the parties in the foregoing
19 deposition and caption named nor in any way interested
20 in the outcome of the cause named in said caption.

21 DATED: February 22, 2005

22

23 JOANNE ICHIKI
24 CERTIFIED SHORTHAND REPORTER
NO. 11660

25

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